



October 16, 2020

The Honorable Tracy O. King
Chairman
Licensing & Administrative Procedures Committee
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Re: Notice of Formal Request for Information/Charge #3 ("Control Label" Products)

Dear Chairman King:

On behalf of the Distilled Spirits Council of the United States, a national trade association representing producers and marketers of distilled spirits and importers of wines sold in the U.S., we welcome the opportunity to respond to the request for information by the House Licensing & Administrative Procedures Committee regarding Charge #3, Control Labels.

We fully appreciate and support the Committee's examination of the impact of control label products on the Texas marketplace and desire to regulate control label products in a manner that promotes economic growth, benefits the consumer, and stabilizes the three-tier system. We share these goals and want to ensure that there is fairness, consumer transparency and a level playing field among all brands available for purchase in the Texas marketplace, as well as compliance with the basic strictures of the three-tier system, which is at the core of alcohol beverage distribution regulation in Texas.

For these reasons, we urge adoption of reasonable "rules of the road" governing the use of control and/or private label distilled spirits brands to ensure a fair and competitive playing field among these and other distilled spirits brands. Our proposed parameters are meant to address current marketplace conditions under which suppliers of national distilled spirits brands have no in-store voice to promote and market their brands in the same way retailers can promote and market their control and/or private label brands.

Our proposal also includes provisions tailored to ensure arms-length transactions between these retailers and their product suppliers in compliance with the State's trade practice scheme, and supports the Commission's right to investigate tied-house violations that may result from the inter-tier collaboration in control and/or private label brands. By enhancing competitive parity, transparency and compliance with the three-

tier system for spirits products in Texas, we believe adoption of our recommendations best serves the interests of Texas consumers.

Notwithstanding the provisions of this Section or otherwise, the Commission reserves the right to investigate all aspects of inter-tier business relationships, including relationships related to control and/or private label brands, in order to determine the presence of tied-house violations that may result from the inter-tier collaboration in control and/or private label brands.

Our recommended provisions, which are intended for inclusion in the Alcoholic Beverage Code and/or the TABC's rules, begin with definitions of what constitutes a control and/or private label brand, and then sets forth the terms and conditions applicable to the use of these products by all tiers of industry, as follows.

Definition of “control and/or private label brand”:

A distilled spirits product made under contract and/or agreement, express or implied, between a distiller or a nonresident seller (referred to collectively as a “manufacturer”) and a retailer for a retailer that (1) may or may not own the trademark, (2) has or does not have intellectual property rights therein and (3) may or may not contain a retailer's trade name, trademark or other words and/or symbols that may or may not be identifiable with a retailer.

A manufacturer may produce a control and/or private label brand for a retailer under the following conditions:

- The retailer or its affiliate pays all costs associated with the development, bottling, labeling, and/or packaging of the control and/or private label brand.
- The retailer or its affiliate may not set the FOB or wholesale cost of a control and/or private label brand with the manufacturer or wholesaler.
- Pricing for a control and/or private label brand shall be independently established by the manufacturer and/or wholesaler.
- The manufacturer must sell the control and/or private label brand to a retailer only through the State's legal distribution system.
- A control and/or private label brand may not use intellectual property elements (which include, but are not limited to, bottle

design, trade dress, packaging, and/or brand name) confusingly similar to any other alcohol beverage product regardless of product class. The Commission shall establish a process and procedures to enforce the provisions of this subsection, and redress any complaints.

- A retailer or its affiliate offering for sale and selling any control and/or private label brand shall clearly disclose in writing to its customers at the point of display, both in-store, as well as in any solicitation, advertising materials or on-line offering, that the control and/or private label brand is the retailer's or retailer affiliate's control and/or private label brand.
- A retailer or its affiliate offering for sale and selling any control and/or private label brand shall comply with all laws, regulations, rules, and trade practice interpretations that are applicable to suppliers, manufacturers and wholesalers of non-control and/or non-private label brands.
- A retailer or its affiliate shall comply with all laws, regulations and rules with respect to quotas, tie-in sales, slotting fee arrangements, tied-house prohibitions, and all other restrictions set forth in the State's regulatory system.
- The manufacturer and wholesaler must keep a record of all control and/or private label brand sales for three years. The record must include (1) the name of the retailer or its affiliate and/or wholesaler buying the product; (2) for each transaction, the quantity of product and the date of sale and delivery; and (3) a list of the quantity of each control and/or private label brand sold to a specific licensed retailer or licensees under the same ownership, control or management of that retailer during each calendar year.
- Notwithstanding the provisions of this Section or otherwise, the Commission reserves the right to investigate all aspects of inter-tier business relationships, including relationships related to control and/or private label brands, in order to determine the presence of tied-house violations that may result from the inter-tier collaboration in control and/or private label brands.

Conclusion

The distilled spirits marketplace has dramatically changed over the last few decades with the growth of retailers and their respective private and control label brands offered for sale in their establishments. To that end, we believe that the proffered proposed

language will benefit all stakeholders to ensure a fair, transparent and competitive marketplace.

Once again, thank you for the opportunity to share our views regarding Charge #3 and please do not hesitate to call if you have any questions.

Sincerely,

A handwritten signature in dark ink, reading "Kristi Brown". The signature is written in a cursive, flowing style. The first name "Kristi" is written with a large, stylized 'K' and 'i'. The last name "Brown" is written with a large, stylized 'B' and 'n'.

Kristi Brown
Senior Director, State Government Relations